THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Opinion No. 2016-UP-261
(S.C. Ct App. filed June 8, 2016)

Samuel T. Brick, ... Petitioner,

v.

Richland County Planning Commission and
Fairways Development, LLC, Intervenor, ... Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
Michael B. Wren
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Richland County Planning Commission

STATEMENT OF THE CASE

This an appeal of a dismissal by the Circuit Court of an appeal from the Richland County Planning Commission filed by the Petitioner Samuel T. Brick ("Brick").

On November 7, 2012, the Respondent Fairways Development, LLC ("Fairways") submitted a Subdivision Review Application and the Sketch Plan to the Richland County Planning and Development Services Department with respect to a proposed development known as "The Villages at Longcreek." (Amended ROA 45-46). The application and submittals were reviewed and approved by the Richland County Development Review Team ("DRT") at its meeting held on November 29, 2012. (Amended ROA 49). The Petitioner Brick then filed an appeal of the DRT's decision to the Respondent Richland County Planning Commission ("Commission"). (Amended ROA 52-60).

At its meeting on February 4, 2013, the Planning Commission heard and denied Brick's appeal. A written order was issued by the Commission on March 4, 2013. (Amended ROA 66-69). Brick received a copy of that written order on March 11, 2013, and subsequently filed a Notice of Appeal in the Circuit Court on March 18, 2013. (Amended ROA 32-42). The Planning Commission was the only respondent named in the Notice of Appeal.

On June 5, 2013, the Planning Commission filed a motion to dismiss Brick's appeal contending that Brick "does not have standing to appeal the Respondent's Order because he is not a property owner whose land is the subject of a planning commission decision pursuant to S.C. Code Ann. § 6-29-1150(D)(2)." (Amended ROA 70-71). Fairways Development, LLC also filed a motion to intervene in the appeal and its own motion to dismiss the appeal. Fairways argued in part that Brick failed to timely name or join Fairways, the development permittee, as a necessary

party to the appeal. (Amended ROA 85-86). Thereafter, on June 27, 2013, Brick filed a motion to amend the Notice of Appeal to add Fairways as a party. (Amended ROA 99).

A hearing on the various motions was held on August 30, 2013, before Circuit Judge DeAndrea Gist Benjamin. At the hearing, Judge Benjamin granted Fairways' motion to intervene and denied Brick's motion to amend his Notice of Appeal.[1] She took the motions to dismiss under advisement. Later, on December 17, 2013, Judge Benjamin issued two orders granting those motions and dismissing Brick's appeal to the Circuit Court from the Richland County Planning Commission because Brick failed to name Fairways Development, LLC as a necessary party to the appeal. (Amended ROA 5-11). Brick filed a Rule 59(e) motion to reconsider, which was denied by form order filed February 5, 2014. (Amended ROA 17).

After briefing by the parties, the Court of Appeals issued an unpublished opinion which affirmed the dismissal of Brick's appeal. *See*, *Brick v. Richland County Planning Commission*, Op. No. 2016-UP-261 (S.C. Ct. App. filed June 8, 2016). Brick thereafter filed a petition for rehearing that was denied by the three-judge panel on August 18, 2016.

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[1] On or about June 27, 2013, Brick filed a motion to amend his appeal to name Fairways Development, LLC as a respondent to the appeal. (Amended ROA 99). That motion was denied by Form Order issued September 16, 2013. (Amended ROA 16). The denial of that motion was not challenged in Brick's subsequent Rule 59(e) motion, nor has that Form Order been appealed. *See*, Notice of Appeal, dated March 11, 2014. (Amended ROA 253-1).

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Richland County Planning Commission submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

II. The Petitioner has improperly raised new issues in his Petition for Writ of Certiorari.

Rule 226(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 226(d)(2) provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question

presented to the Supreme Court." Rule 226(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218, 221 (2000).

A comparison of Brick's petition for rehearing with what he has now filed as a petition for writ of certiorari reflects that Brick is raising new issues in the current petition to this Court. On this additional basis, the Court is urged to deny a writ of certiorari.

III. As to the merits, the Court of Appeals correctly affirmed the dismissal of the Petitioner's appeal to the Circuit Court based on the failure to timely name the development permittee as a necessary party to the appeal.

The Court of Appeals was correct in affirming the dismissal of Brick's appeal to the Circuit Court from the Richland County Planning Commission because Brick failed to name Fairways Development, LLC as a necessary party to the appeal. That decision is premised on the rulings by this Court in *Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988), in which this Court adopted the majority rule nationally and ruled that a development permittee is a necessary party to an appeal from a planning commission to the Circuit Court. This Court explained that "[d]esignating the permittee a necessary party insures the most vitally interested party's participation in the appellate process." 367 S.E.2d at 161. "Additionally, the majority rule insures that where a circuit court reverses a permit approval, the permittee will be bound because it is a party to the appeal." *Id.*

On appeal, Brick has not challenged the rule announced in *Spanish Wells* that the development permittee, here the owner of the proposed development known as "The Villages at Longcreek," is a necessary party to the Circuit Court appeal. Brick also has not disputed that he did not name Fairways Development, LLC as a party to the appeal initially or within the thirty day

period he was allowed by Section 6-29-1150(D)(1) to commence the appeal. Instead, Brick has made the following arguments which were correctly rejected by the Court of Appeals: (1) Fairways was made an intervenor in the appeal and thus has the opportunity to be heard; (2) Fairways Development, LLC is not a necessary party because "Fairways Development Group" was identified as the applicant; and (3) Fairways is subject to collateral estoppel because it sought dismissal as a party in a Freedom of Information Act (FOIA) action brought by Brick. As indicated by the Court of Appeals' decision, each of these arguments is meritless.

As an initial argument, Brick claims that Fairways was allowed to intervene in the appeal and thus has achieved the status of a party. Brick fails to recognize, however, that the failure to name a necessary party to an appeal is jurisdictional and cannot be corrected after the appeal time has elapsed. Thus, as Judge Benjamin and the Court of Appeals correctly ruled, Brick's failure to make Fairways a party to the appeal within thirty days of the receipt of the decision of the Planning Commission is fatal to his appeal. That ruling is consistent with *Spanish Wells*, where this Court affirmed the dismissal of a circuit court appeal for the failure of the appealing party to timely join the development permittee to the appeal.

In *Vulcan Materials Co. v. Greenville County Board of Adjustment*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), the Court of Appeals held that "the timeliness of an appeal from a zoning board's decision is a jurisdictional requirement." 536 S.E.2d at 896, n.7. The timeliness of an appeal from a planning commission is no different. Section 6-29-1150(D) governs the filing of appeals from a decision of a planning commission to the Circuit Court. Section 6-29-1150(D)(1) provides that "[a]n appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision." S.C. Code Ann. § 6-29-1150(D)(1). Likewise, as the Court of Appeals pointed out, Rule 74, SCRCP, also requires that "[n]otice of appeal to the circuit court must be served *on all parties* within thirty (30) days after

receipt of written notice of the judgment." Rule 74, SCRCP. (Emphasis added). Here, Brick received actual notice of the challenged decision of the Planning Commission on March 11, 2013. Thus, he had thirty days – until April 10, 2013 – to file a appeal naming all necessary parties, including Fairways. However, Fairways was not named in the initial appeal or added by an amended notice of appeal within the thirty-day appeal period provided by Section 6-29-1150(D)(1). Consequently, his appeal was not perfected within the thirty-day appeal period and was correctly dismissed on that basis.

As an excuse for his failure to name Fairways as a necessary party to the appeal, Brick continues to insist that Fairways Development Group rather than Fairways Development, LLC was the "applicant" on the Subdivision Review Application and the Sketch Plan submitted to the Richland County Planning and Development Services Department. However, this excuse in unavailing for several reasons.

First, both the Subdivision Review Application and the Sketch Plan were signed by John T. Bakhaus for "Fairways Development, LLC." (Amended ROA 45-46). Thus, as Judge Benjamin correctly found, the development permittee was Fairways Development, LLC, and that was evident from the documents submitted to the Planning Commission. Brick knew or should have known that Fairways Development, LLC was the appropriate party to join as a necessary party to the appeal.

Second, the FOIA action on which Brick relies for his collateral estoppel argument shows that he, in actuality, had no confusion regarding the identity of Fairways Development, LLC as the development permittee. Brick's complaint in the FOIA action, which was filed October 12, 2012, and thereby pre-dating the Circuit Court appeal at issue, actually names "Fairways Development, LLC" as a party-defendant. In that complaint, Fairways Development, LLC is identified as the "owner of property in a residential, single family low density district (Section

26-89 of the code) in Richland County, [which] applied to the Richland County Planning and Development Services Department for development of approximately 100.7 acres under section 26-186 of the code." (Supp. ROA 5). Thus, there can be no doubt that Brick was aware in March 2013 that Fairways Development, LLC was the owner of the subject development.

Third, any confusion about the precise name of the Fairways does not excuse the failure of Brick to name the development permittee as a party to the appeal. If Brick was of the belief that Fairways Development Group was the applicant based on the Subdivision Review Application and the Sketch Plan, that entity, at the very least, should have been named as a party to the appeal. Brick, however, made no attempt to name *any* "Fairways" entity. He simply did not name the development permittee as a party to the appeal, and that is what was fatal to his appeal.

Finally, the Court of Appeals was correct in rejecting Brick's collateral estoppel argument. This issue is not properly preserved for appellate review, as the Court of Appeals noted with its cite to *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731 (1998). Nonetheless, even if the merits are considered, Brick's argument is legally frivolous, In effect, Brick argues that Fairways sought to be dismissed as a party-defendant in a FOIA action brought against Richland County and is thus precluded from claiming to be a necessary party in the appeal from the Planning Commission. *See*, *Brick v. Richland County*, Civil Action Number 2012-CP-40-7337. Collateral estoppel, however, is inapplicable in this context. Fairways was dismissed as a party to the FOIA action because Fairways was not a necessary or even proper party in that litigation. (Amended ROA 20-21). Section 30-4-80 places the responsibilities of compliance with FOIA on the "public body." S.C. Code Ann. § 30-4-80. Therefore, the "public body," in this case Richland County, is the only proper defendant for an enforcement action under FOIA. Fairways, as a private entity, has no responsibilities or duties under FOIA. In that action, Fairways was an improper party. In

contrast, in the present appeal, Fairways is a necessary party per the *Spanish Wells* decision. There is no preclusive effect from the FOIA action, and Brick's suggestion to the contrary is simply wrong.

In sum, it is undisputed that Fairways Development, LLC, as the development permittee, was a necessary party to the appeal. It is further undisputed that Fairways was not named as a party to the appeal within the thirty-day appeal period. Consequently, Judge Benjamin and the Court of Appeals were correct in finding a jurisdictional defect and in dismissing the appeal consistent with existing precedent, specifically the *Spanish Wells* decision. There is no basis for the issuance of a writ of certiorari.

CONCLUSION

Based on the foregoing discussion, the Respondent Richland County Planning Commission respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
MICHAEL B. WREN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Richland County Planning Commission

Columbia, South Carolina

October 18, 2016

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent Richland County Planning Commission, does hereby certify that service of the **Return to Petition for Writ of Certiorari** was made upon the *pro se* Petitioner and all other counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 18th day of October 2016:

Mr. Samuel T. Brick
124 Runneymede Drive
Blythewood, South Carolina 29016

Tobias G. Ward, Jr., Esquire
J. Derrick Jackson, Esquire
Tobias G. Ward, Jr., P.A.
Post Office Box 6138
Columbia, South Carolina 29260